REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 4 OF 2017

SIGNATURE TOURS & TRAVEL LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

1. By a Notice of Motion dated 27th February 2018 brought under Section 1A, 1B and 63 of the Civil Procedure Act, CAP 21, Order 10 Rule 11 of the Civil Procedure Rules and Article 159 (2) (d) of the Constitution of Kenya, the Applicant National Bank Of Kenya Limited is seeking the following orders:

a) ***That this application be certified urgent and heard ex-parte in the first instance.***

b) That pending hearing and determination of this application there be a stay of execution of this court's judgement entered against the defendant if any.

c) That this court's interlocutory judgment dated 7/12/2017 and all other consequential decree or orders emanating from the same be set aside.

d) That this Honourable Court deems the Defendant/Applicant's defence filed on 13th February 2018 as properly filed.

e) That the costs of this application be in the cause.

2. The application is based on the grounds on the face of the motion namely:-

i. ***That there exists another suit in this court and another in Milimani Law Courts the same being Machakos ELC 124 of 2016, and Nairobi High Court Civil Case No 101 of 2016 in which the plaintiff is also a party.***

ii. That the plaintiff in this suit seeks to circumvent the consent order in Nairobi High Court Civil Case no 101 of 2016.

iii. That the said Nairobi High Court Civil Case no 101 of 2016 and Machakos ELC 124 of 2016 involve the same property and the same plaintiff's account as in this suit.

iv. That the applicant filed its defence to the suit on 13th February, 2018 after raising a defence of res judicata.

v. That setting aside of the judgment will not prejudice the interests of the plaintiff and or such prejudice if any can be compensated by costs.

vi. That the plaintiff has not denied the debt but raises issues in the manner of computation of interest and charges imposed on the loan amount.

vii. That the defence filed on 13th February, 2018 raises triable issues and if the ex-parte judgment is not set aside the defendant would be condemned unheard which is contrary to the rules of natural justice.

3. The application is supported by the affidavit of the Head of Commercial Transactions and Litigation of the Applicant sworn on 27th February 2017 and another undated affidavit filed on 10th May 2018 in which he reiterates the grounds in the application and further depones that no notice of entry of judgment was served on the applicant. The applicant depones that it has a good defence to the suit and the said

defence raises triable issues, however it inadvertently failed to file the same within the stipulated time.

4. It is the Applicant's further deposition that the honorable court exercise it's discretion. The applicant therefore seeks that the orders sought in the application be granted. The applicant has not annexed any documents in support of its application.

5. The plaintiff opposed the application and filed a Replying Affidavit sworn by the director of the plaintiff/respondent on 22nd March, 2018 in which she depones inter alia, that the applicant admits to service of the pleadings on them and in default of filing a defence, a request for judgment was made and the same was entered and the matter is to come up for formal proof. The said request has been annexed and marked KM1. The plaintiff states that service was proper therefore judgment that was entered is proper. The plaintiff denies that the applicant's defence raises any triable issues because it fails to respond to the plaintiff's allegations of fraud and illegalities, and further that the applicant has lodged a defence and counterclaim in the Machakos ELC 124 of 2016 and the same is word for word in the intended defence herein and therefore the intended defence is unnecessary.

6. It is the plaintiff's case that the orders sought cannot be granted for the judgment entered is regular and if set aside it will erode a judgment that it has obtained in respect of the massive losses it has suffered on account of the applicant; that the application be dismissed with costs.

7. The court gave directions that the application be canvassed by way of written submissions which were duly filed and the applicant was granted leave to file and serve supplementary submissions which were filed on 7th August, 2018. Interim orders of stay were extended.

8. The applicant submitted inter alia, that it has come to court with clean hands and is willing to defend the suit and should be allowed to do so to avoid injustice; that it has actively participated in the court proceedings as the court record will show. The said applicant submits that there are two other suits ongoing in relation to the suit property with the same parties, and that the respondent has filed a notice of appeal following the ruling delivered on 24th November, 2017. The applicant further submitted that the failure to file a defence is due to the inadvertence of the advocates who concentrated on defending the application for an injunction, thus the mistake of the advocate should not be visited on the client. They invited me to rely on the case of **Prime Bank Limited v Paul Otieno Nyamodi (2014) eKLR**. They submit that the *ex-parte* judgment if allowed to stand shall condemn the applicant unheard, contrary to Article 50 of the Constitution. The applicant denies service of the interlocutory judgment hence it would have filed the application earlier. The applicant submits that it's defence raises triable issues, one being the mandate to exercise a right of sale by public auction. I was invited to rely on the observation of Emukule J in **Elijah Sikon & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance v Mara Conservancy & 5 Others (2014) eKLR.** I was also invited to find that the defendant be awarded costs, and referred to the case of **Jasbir Singh Rai & Others v Tarlochan Singh Rai and 4 Others (2014)eKLR .** In response to the respondent's submission that the application is incompetent for offending Sections 23(2A) and 34(A) of the Advocates Act, the applicant submits that the Law Society of Kenya has not yet issued advocates with the statutory mandated stamp or seal.

9. On their part, the plaintiff raised issue with the application as being incompetent for offending Sections 23(2A) and 34(A) of the Advocates Act. In submitting on the principles for setting aside a default judgment, the plaintiff relied on the case of **Shah v Mbogo (1967) EA 116** and submits that summons had been served on the defendant, a fact which they have admitted in paragraph 7 of the supporting affidavit. I was directed to the finding of Olga Sewe J in **K-Rep Bank Ltd v Segment Distributors Ltd (2017) eKLR** that where summons and the plaint were duly served, it follows that the default judgment was regularly entered thus court should be slow in setting it aside. In answering the issue of the defence raising triable issues, the plaintiff submits that the proposed defence fails to respond to the allegations of fraud and illegalities claimed against it, and that it is at liberty to cross-examine the plaintiff's witnesses at the formal proof hearing therefore it cannot be said that the defendant shall not be heard. It further submits that if the application is allowed, then the applicant deposits the principal amount of Kshs 1,317,063,000/- in a joint interest earning account.

10. I have carefully considered the application, the affidavits both in support and against, the rival submissions and the authorities cited as well as the pleadings herein. The main issues that I am supposed to determine in my considered view, are as follows:

i. Whether I should set aside the ex parte judgment that was entered into by the court in favour of the plaintiff and all other consequential orders;

ii. Whether the applicant, should be allowed to file the defence out of time;

iii. Who is entitled to costs.

iv. What consequential orders may be granted.

11. The dispute in this suit revolves around the property that was repossessed by the defendant and the plaintiff alleges that it lost business worth Kshs 1,317,063,000/- because of the actions of the defendant. The plaintiff filed this suit on 8th February 2017 against the defendant, seeking inter alia to recover Kshs 1,317,063,000/-. The defendant's branch manager was duly served with summons to enter appearance. It filed a memorandum of appearance on 16th February, 2017 but failed to file a defence and upon request by the plaintiff, default judgment was entered against the defendant and the matter is to come up for formal proof.

12. One of the main grounds in support of the application is that the plaintiff failed to disclose that there exists another suit in this court, **Machakos ELC 124 of 2016, and Nairobi High Court Civil Case No 101 of 2016 in which the plaintiff is also a party**, and which involve the same subject matter and that the applicant has been condemned unheard.

13. Order 10 Rule 11 of the Civil Procedure Rules provides as follows:

"Where judgment has been entered under this order the court may set aside or vary such judgment and any consequential

decree or order upon such terms as are just."

In the case of ***James Kanyiita Nderitu & Another [2016] eKLR***, the court of Appeal stated thus:

> *"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.*
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> *In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."*

14. In the instant case, apparently, there is no dispute that the Defendant/Applicant entered appearance within the stipulated time. However, the Applicant did not file a Statement of Defence within 14 days of entering appearance as required under Order 7 Rule1 of the Civil Procedure Rules 2010. The Statement of Defence was filed on 13th February, 2018. This was well over 14 days.

15. In the meantime, the Plaintiff requested for interlocutory judgment against the Applicant on 27th March 2017. It is clear that the said default judgment was entered on 7th December, 2017.

16. I have gone through all the documents on the court file, and I find that the default judgment was entered on 7.12.2017, there are court proceedings to indicate that the same was entered. From the material placed before me, it is clear that the plaintiff was very much aware of the existence of **Machakos ELC 124 of 2016, and Nairobi High Court Civil Case No 101 of 2016 in which the plaintiff is also a party** yet the plaintiff made an averment and further swore a verifying affidavit in the instant suit that there is no other suit pending and that there was no previous proceedings between the plaintiff and the defendant. The plaintiff made the averment and swore the verifying affidavit knowing very well that it was not telling the truth. Indeed the plaintiff succeeded in duping this court into granting the reliefs sought in the plaint. The plaintiff failed to make material disclosure to this court when filing and prosecuting this suit. The plaintiff concealed crucial facts from this court to achieve its objective of obtaining a judgment and a decree. As stated by *Ojwang, J (as he then was) in* ***Mungai –vs-Gachuhi & Another [2005] eKLR***. "a court decision stands as a final decision only when a proper hearing has taken place and the parties and those who ought to be enjoined as parties have been fully heard and their representations concluded, unless they elect to forgo the opportunity. As those conditions had not been satisfied when I heard the matter and that hearing led to the said ruling, it is apparent that some of the most crucial matters of fact were inadvertently or deliberately distorted, and so just outcome could not have been arrived at…"

17. In my considered view, and taking into account all the circumstances of this case, I find that there is an irregular default judgment entered by this court. An irregular judgment is liable to be set aside by the court ex debito justiae as a matter of judicial duty to remedy the situation. In order to uphold the integrity of the judicial process, I do set aside the default judgment entered on 7.12.2017.

18. I have considered the reasons advanced for the delay in filing the defence, being that the Defendant/Applicant could not trace its investigating file and I find that it has no merit. The issue is a matter within the Applicant's knowledge and over which the Court cannot be able to authenticate, for the applicant has not attached copies of pleadings in the said **Machakos ELC 124 of 2016, and Nairobi High Court Civil Case No 101 of 2016**. However, I do appreciate that, every person has a constitutional right to be heard, and that parties should not be deterred from approaching the seat of justice. In this regard, I have considered the Statement of defence annexed to the Affidavit in support of the Application and I find the Applicant has raised an issue that the claim herein is *res judicata.* It will be in the interest of justice to accord the Applicant an opportunity to be heard. In summation, I wish to refer to the holding in the case of; *In* ***Sebel District Administration vs Gasyali & Others (1968) E.A. 300***, *the Court* ,observed that:-

> *"In my view the Court should not solely concentrate on the poverty of the Applicant's excuse for not entering appearance or filing a defence within the prescribed time. The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly should be considered, the question as to whether the Plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a court. It is wrong under all circumstances to shut out a defendant from being heard. A defendant should be ordered to pay costs to compensate the plaintiff for any delay occasioned by the setting aside and be permitted to defend."*

19. In the light of the aforesaid, I allow the Notice of Motion Application dated 27th February, 2018, in terms of prayers 2, 3 and 4 on condition that:-

i.The Applicant statement of defence filed on the 13/2/2018 is deemed as properly filed and a copy thereof be served upon the

Plaintiff/Respondent within seven (7) days from the date of this ruling.

ii. The applicant to pay the Respondent throw away costs of Kshs 10,000.

iii. The costs of this Application be in the cause.

It is so ordered.

Dated and delivered at Machakos this 4th day of December, 2018.

D. K. KEMEI

JUDGE